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FEDERAL COMMUNICATIONS COMMISSION

November 9, 1999

By Hand

EX PARTE OR LATE FILED

Magalie Roman Salas
Secretary
Federal Communications Commission
Room CY-A257
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Written Ex Parte Submission
In the Matter of Deployment of Wireline Services
Offering Advanced Telecommunications Capability
CC Docket No. 98-147

Dear Ms. Salas:

Transmitted herewith for inclusion in the public record of the above-referenced "permit but disclose" proceeding are two copies of a written *ex parte* letter that was delivered this day to Lawrence E. Strickling, Chief of the Common Carrier Bureau.

If you have any questions concerning this filing, please contact the undersigned.

Sincerely,

A. Richard Metzger

A. Richard Metzger, Jr.

cc: Carol Mattey
Vincent Paladini
Staci Pies

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND

Lawrence Strickling, Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written *Ex Parte* Submisson
CC Docket No. 98-147

Dear Mr. Strickling:

This written *ex parte* submission is filed on behalf of NorthPoint Communications, Inc. (NorthPoint), Covad Communications Company (Covad) and Rhythms NetConnections, Inc. (Rhythms) in connection with the issues currently under consideration in the above-referenced rulemaking proceeding. NorthPoint, Covad and Rhythms are competitive local exchange carriers (LECs) that provide Digital Subscriber Line (DSL) service in markets throughout the United States.

DSL competitive LECs have shown in their comments and prior written *ex parte* submissions in this proceeding that access to line sharing as an unbundled network element is essential to delivering broadband services on a competitive basis to residential consumers. In the absence of access to shared lines, DSL competitive LECs are required to provision DSL services on second, stand-alone loops, whereas, the Incumbent LECs provide such DSL services shared loops with existing POTS services. In many cases, residential consumers who may wish to purchase competitive DSL services are already using the second drop to their premises for fax or a second voice loop. Consequently, in those instances, there is no separate, stand-alone loop available for a DSL competitive LEC to use to deliver service in competition with the incumbent LECs and DSL competitive LECs are precluded from serving those subscribers. Even where second, stand-alone loops are available, forcing DSL competitive LECs to use such loops rather than to provide services more efficiently over shared lines imposes an artificial cost increase on competitive offerings. As a result of their ability to deny DSL competitive LECs access to shared lines, incumbent LECs currently offering DSL over a shared line enjoy a very substantial pricing advantage over DSL competitive LECs that are limited to offering DSL service to residential customers over a separate, unbundled loop.

The record in this proceeding fully supports a finding that access to shared lines by unbundling the higher frequency portion of the loop satisfies the "impair" test for unbundled network elements the Commission recently adopted in its decision in the Local Competition rulemaking proceeding.[1] In that order, the Commission held that: "the failure to provide access to a network element would 'impair' the ability of a requesting carrier to provide the services that it seeks to offer if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer."[2] As noted above and discussed in prior submissions by DSL competitive LECs, in the absence of line sharing, these competitive LECs effectively are prevented from offering their service to consumers that already use their loops for voice and other services. Moreover, in cases where a separate loop is available, as the Commission expressly observed in *Remand Order,* DSL competitive LECs must incur "additional non-trivial costs" by purchasing a separate loop to serve their customers, whereas an incumbent LEC may use a single copper pair to offer voice and DSL services. The Commission further concluded that "these non-trivial costs are substantial enough to impair the requesting carrier's ability to provide the services it seeks to offer within the meaning of section 251(d)(2)."[3]

The Commission's discussion of subloop unbundling is also instructive, because factors on which the Commission relied to order access to subloops apply with equal force to the provision of line sharing. In that case, as here, the fact that the Commission requires incumbent LECs to unbundle local loops "does not always afford competitors access to subscribers."[4] Moreover, as the Commission noted in requiring subloop unbundling, "[i]f competing carriers that need only a portion of the loop must either pay for the entire loop or forego access to that loop altogether, many consumers will be denied the benefits of competition."[5]

The comments and other submissions of DSL competitive LECs in this proceeding also have shown that incumbent LECs have the technical capability to offer access to line sharing as an unbundled network element without causing interference to voice grade traffic carried over lower frequencies. DSL competitive LECs further have

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[1] *See* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (FCC 99-238), CC Dkt. No. 98-96 (Nov. 5, 1999) (*Remand Order).*

[2] *Id.* at para.51.

[3] *Id.* at para. 310.

[4] *Id.* at para. 212. In the case of subloop unbundling, the availability of an undivided loop may not permit a competitive LEC to provide the service it seeks to offer, because the entire loop consists of both copper and fiber. In the case of line sharing, there may not be a stand-alone loop available.

[5] *Id.*

demonstrated that the incumbent LECs' claims concerning alleged operational barriers to line sharing are either unfounded or substantially overstated. In particular, DSL competitive LECs have provided credible evidence from an expert on Operations Support Systems (OSS) issues showing that the modifications to existing OSS capabilities are relatively modest and, in any event, manual "work arounds" can be used while more permanent, electronic solutions are tested and implemented.[6]

In view of the record developed in this proceeding, the Commission plainly should order incumbent LECs promptly to make available access to shared lines as an unbundled network element to competitive LECs. Moreover, in light of the importance of line sharing to broadband competition in the residential market, the Commission should ensure that agreements between incumbent and competitive LECs are amended to incorporate the provision of line sharing as promptly as possible and in any event no later than the end of the nine-month period established by section 252 of the Communications Act of 1934, as amended, for the completion of the negotiation and arbitration process.[7]

NorthPoint, Covad and Rhythms cannot overstate the importance of certainty in the prompt implementation of line sharing to assure their wholesale customers that they will have timely access to the residential market. Indeed, DSL competitive LECs have suggested in prior submissions in this proceeding that the Commission has authority to require implementation of line sharing in advance of the completion of the nine-month negotiation/arbitration process.[8] Should the Commission choose not to adopt those recommendations, however, it is vital that DSL competitive LECs be assured that in any case they will be able to begin offering service no later than a specified date certain.

Specifically, the Commission's order should make clear that: 1) a competitive LEC may submit a request for access to line sharing as an unbundled network element concurrently with the effective date of the order; 2) in the event that the parties are unable to reach agreement through negotiations, the state commission shall arbitrate unresolved issues that are referred to it, pursuant to section 252(b),[9] consistent with the principles that NorthPoint and HarvardNet outlined in their written *ex parte* submission of October 8, 1999;[10] 3) the state commission is required to "conclude the resolution of any

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[6] *See* Letter to Magalie Roman Salas, Secretary from Michael Olsen, NorthPoint Communications, Inc., CC Dkt. No. 98-147 (Sept. 30, 1999).

[7] *See* 47 U.S.C. § 252(b)(4)(C).

[8] *See, e.g.,* Letter to Magalie Roman Salas, Secretary from Michael Olsen and Melanie Haratunian, CC Dkt. No. 98-147 (Oct. 8, 1999) ("October 8, 1999 *Ex Parte*").

[9] *See* 47 U.S.C. § 252(b).

[10] *See* October 8, 1999 *Ex Parte* (setting forth pricing principles that state commissions should be required to follow in arbitrating agreements to provide line sharing, including requirement that incumbent LECs not be permitted to recover in price for shared line

unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section;"[11] and 4) in the event that a state commission is unable to complete the arbitration on a timely basis, the Commission, in response to a request, is prepared to act promptly, pursuant to section 252(e)(5) and its implementing rules,[12] to issue an order "preempting the State commission's jurisdiction of that proceeding or matter" and thereafter to bring the arbitration to an orderly, expeditious conclusion.

The DSL competitive LECs recognize that state commissions and their able professional staffs are already involved in numerous important telecommunications proceedings that place a significant strain on their limited resources, such as comprehensive section 271 compliance proceedings and universal service reform proceedings. Although the arbitration of a dispute over the provision of access to shared lines clearly involves a far more limited set of issues than those the state commissions resolved in handling the initial wave of interconnection agreements in 1996, it is possible that a state commission might need additional time to resolve one or a few issues referred for arbitration. In that event, the Commission should make clear in its order that it would not be inclined to invoke its jurisdiction under section 252(e)(5) if the state commission ordered an incumbent LEC to begin offering access to line sharing no later than the expiration of the nine-month deadline on an interim basis, with any unresolved issues subject to a true-up when the state commission completes its arbitration.

In that regard, two issues bear mention. First, as the Commission is aware, a few states have already taken significant steps toward requiring incumbent LECs in their jurisdiction to offer line sharing.[13] Clearly, the Commission's requirement that line sharing be made available on a nationwide basis should not interfere with or delay the laudable efforts of individual states to make residential DSL competition a reality more expeditiously. Rather, the timetable outlined above for implementing line sharing should be viewed as a maximum period for states that have not yet taken any actions to make line sharing available, either through the exercise of their authority under section 252 or pursuant to their authority under state law. The Commission's order should not constrain states that have undertaken such initiatives that likely will result in delivering the benefits of line sharing to their residential consumers more quickly.

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element an amount for allocated loop cost that exceeds loop cost recovered from their tariffed prices for DSL service furnished over shared lines).

[11] *See* 47 U.S.C. § 252(b)(4)(C).

[12] *See* 47 U.S.C. § 252(e)(5); 47 C.F.R. §§ 51.801 *et seq.*

[13] *See* Minn. Pub. Utils. Comm'n, Dkt. No. P-999/CI-99-678, Order Requiring Technical Trials, Good Faith Resolution of Operational Issues, and a Resulting Report (Oct. 8, 1999)(requiring US West to complete technical and field trials prior to commercial implementation of line sharing in no more than 45 days); California High Speed Internet Access Act of 1999, AB 991, Ch. 714 (Oct. 10, 1999)(requiring California Commission to implement line sharing no more than 90 days after final order).

Second, there have been instances in the past where a state commission concluded an arbitration within the statutory period, but there was then a delay before the arbitration decision was reflected in an executed agreement between the parties. To ensure that such delays do not unreasonably slow the implementation of line sharing, the DSL competitive LECs urge the Commission to require parties to file no later than 30 days after issuance of an arbitration decision a conforming agreement.

In sum, NorthPoint, Covad and Rhythms urge the Commission to take the necessary concrete steps not only to require the provision of line sharing as an unbundled network element, but also to ensure that access to shared lines is in fact made available to competitive LECs promptly.

Respectfully submitted,

A. Richard Metzger

A. Richard Metzger, Jr.

cc: Carol Mattey
Vincent Paladini
Staci Pies